



Billing Code: 4410-18

DEPARTMENT OF JUSTICE

Office of Justice Programs

28 CFR Part 31

[Docket No.: OJP (OJJDP) 1719]

RIN 1121-AA83

Juvenile Justice and Delinquency Prevention Act Formula Grant Program

AGENCY: Office of Justice Programs, Justice.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Office of Justice Programs (“OJP”) proposes to update the implementing regulation for the Formula Grant Program authorized by Title II, Part B, of the Juvenile Justice and Delinquency Prevention Act of 1974 (“the Act” or “JJDPA”).

The purpose of the Formula Grant Program is to provide formula grant awards to states to support juvenile delinquency prevention programs and to improve their juvenile justice systems. The proposed rule would supersede the existing Formula Grant Program regulations to reflect changes in the 2002 JJDPA reauthorization as well as policy changes to the Formula Grant Program.

DATES: Comments must be received by no later than 11:59 p.m., E.T., on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may view an electronic version of this proposed rule at <http://www.regulations.gov>, and you may also comment by using the

www.regulations.gov form for this regulation. OJP welcomes comments from the public on this proposed rule and prefers to receive comments via www.regulations.gov when possible. When submitting comments electronically, you should include OJP Docket No. 1719 in the subject box. Additionally, comments may also be submitted via U.S. mail, to: Mr. Gregory Thompson, Senior Advisor, Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Department of Justice, 810 7th Street, N.W., Washington, D.C. 20531. To ensure proper handling, please reference OJP Docket No. 1719 on your correspondence.

FOR FURTHER INFORMATION CONTACT: Mr. Gregory Thompson, Senior Advisor, Office of Juvenile Justice and Delinquency Prevention, at 202-307-5911.

SUPPLEMENTARY INFORMATION:

I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you wish to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not wish for it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You must also locate all the personal identifying information you do not want posted online in the first paragraph of your comment and identify what information you want redacted.

If you wish to submit confidential business information as part of your comment but do not wish it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You must also prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. Confidential business information identified and located as set forth above will not be placed in the agency's public docket file, nor will it be posted online. If you wish to inspect the agency's public docket file in person by appointment, please see the "For Further Information Contact" paragraph.

II. Executive Summary

A. Purpose of the Proposed Regulatory Action

Title II, Part B, of the JJDPA authorizes the Administrator of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to make formula grant awards to participating states to assist them in planning, establishing, operating, coordinating, and evaluating projects directly or through grants and contracts with public and private agencies for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system. OJP proposes this rule pursuant to the

rulemaking authority granted to the Administrator under 42 U.S.C. 5611. The proposed rule would codify and update the existing regulation promulgated at 60 FR 21852 on May 31, 1995, and amended at 61 FR 65132 on December 10, 1996 (the “current regulation”), to reflect statutory changes included in the 2002 reauthorization of the JJDPa as well as changes in OJP policy regarding administration of the commonly-named Part B Formula Grant Program (Formula Grant Program).

B. Summary of the Major Provisions of the Proposed Regulatory Action

As discussed more fully in section IV, below, the proposed rule contains the following major provisions that differ from the current regulation: (1) establishing new substantial compliance standards in place of the current *de minimis* standards for determining states’ compliance with the deinstitutionalization of status offenders (DSO), (42 U.S.C. 5633(a)(11)), separation (42 U.S.C. 5633(a)(12)), and jail removal (42 U.S.C. 5633(a)(13) requirements; (2) codifying the requirement authorized under the Act at 42 U.S.C. 5633(a)(14) that states must annually submit compliance monitoring data from 100% of facilities that are required to report such data; (3) changing the compliance data reporting period to the federal fiscal year, as required by the Act at 42 U.S.C. 5633(c); (4) providing a definition for the term “detain or confine” as used in the separation and jail removal requirements; and (5) providing a definition of “placed or placement,” as used in the DSO requirement.

In addition, the proposed rule would eliminate portions of the current regulation that (1) are repetitive of statutory text, including definitions that are included in the Act at 42 U.S.C. 5603; (2) contain references to statutory, regulatory and other requirements

that apply to all OJP grantees and that are found elsewhere (such as those described in the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, at 2 CFR part 200); (3) were rendered obsolete by the 2002 JJDP A reauthorization; (4) are recommendations, rather than requirements for compliance and will be included in OJJDP policy guidance; and (5) are included in the Formula Grant Program solicitation, and that need not be included in the rule.

C. Cost and Benefits

Although it is difficult to quantify the financial cost that states would incur under the proposed rule, some of the proposed provisions would require states to dedicate additional time and resources to collecting, verifying, and reporting additional compliance monitoring data, using the on-line data collection tool that OJJDP will provide. In addition, the proposed new compliance standards may result in more states' being found out of compliance than would be out of compliance under the current standards. OJP discusses below some of the estimated costs to states of the proposed rule.

Under the proposed new compliance standards for DSO, separation, and jail removal, forty-eight states, based on 2013 compliance data, would be out of compliance with one or more of these requirements. As a result, pursuant to the requirements of the JJDP A, these states would be required to expend 50% of their reduced allocation to achieve compliance with the core requirement(s) for which a determination of non-compliance was made. At least in the short term, less funding would be available to pass through to local entities, to provide programming and services for at-risk youth, and *per*

capita spending for this population would be reduced. It should be noted however, that prior to the proposed compliance standards taking effect, OJJDP would provide targeted training and technical assistance to those states and localities that have been identified as experiencing issues impacting their ability to comply with all of the requirements of the JJDPA. Ultimately, the desired outcome would be that fewer at-risk youth would be placed or detained in juvenile facilities, resulting in reduced operational costs for the facilities, and redirecting these savings for additional programing and services for youth at their earliest involvement with the juvenile justice system.

III. Background

OJJDP administers the Formula Grant Program, pursuant to Title II, part B, of the JJDPA, authorized at 42 U.S.C. 5631, et seq. The Formula Grant Program authorizes OJJDP to provide formula grants to states to assist them in planning, establishing, operating, coordinating, and evaluating projects directly or through grants and contracts with public and private agencies for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system. “State” is defined in the JJDPA as “any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands[.]” (42 U.S.C. 5603(7)). The JJDPA was originally enacted in 1974, authorizing the Formula Grant Program under Title II, Part B, and was reauthorized and amended in 1980, 1984, 1988, 1992, and 2002. With respect to the core requirements, the original Act addressed only

the DSO and separation requirements. In 1980, the Act was amended to add the jail removal requirement. The 1988 amendments added the requirement that states address disproportionate minority confinement. When the Act was amended in 1992, the Formula Grant Program was amended to require that each state's formula grant funding would be reduced by 25% for each core requirement(s) with which it was determined to be out of compliance. In addition, a non-compliant state would be required to spend its remaining formula grant allocation for that year on achieving compliance with the core requirement(s) with which it was determined to be out of compliance. The 1992 JJDPa amendments also elevated the disproportionate minority confinement requirement to a core requirement, non-compliance with which would result in states' funding being reduced. The 2002 reauthorization decreased the amount of the reduction for non-compliance with each core requirement to 20%, and reduced to 50% the amount that states were required to spend to come into compliance with the core requirements; changed "disproportionate minority confinement" to "disproportionate minority contact"; and added the requirement that states have in effect a policy that individuals who work with both juveniles and adult inmates be trained and certified to work with juveniles.

These formula grant dollars fund programs that serve over 170,000 at-risk youth per year and allow appropriate youth to stay in their communities rather than face secure detention. If detaining the youth is necessary, these funds can be used to ensure they are held pursuant to the core requirements of the JJDPa.

The Formula Grant Program provides funds for services to youth across the juvenile justice continuum. Examples include diversion programs, delinquency and gang

prevention programs, community-based programs and services, after-school programs, alternative-to-detention programs, programs to eliminate racial and ethnic disparities at all decision and contact points in the juvenile justice system, the provision of indigent defense services, and aftercare and reentry assistance. As noted in OJJDP's Annual Report, during FY 2014, the latest year for which data is available, a total of 173,340 youth participants were served in various programs funded by formula grants. Of that number, 86% of program youth exhibited a desired change in the targeted behavior in the short term. Targeted behaviors and risk factors included antisocial behavior, truancy, substance use, low self-esteem, problematic family relationships, and other areas that need to be addressed to ensure positive youth development. Measures of long-term outcomes also showed a positive trend – 88% of program youth exhibited a desired change in the targeted behavior 6-12 months after leaving or completing the funded program. A significant number of grantees funded through formula grants report that they are implementing evidenced-based programs or practices. In fact, during FY 2014, 42% of grantees and subgrantees implemented evidenced-based programs or practices.

Unlike the many OJP grant programs that are discretionary in character, the Formula Grant program is a mandatory statutory formula program – that is, a statutory program, in the nature of an entitlement, where the amount of each grant, and the identity of each recipient, typically is determined using a statutorily-prescribed formula based (in this instance) on the relative number of individuals under age eighteen in the recipient jurisdiction's population, pursuant to the Act at 42 U.S.C. 5632(2). Under title II, part B, of the Act, OJJDP is *required* to make an award to each participating state, so long as the

conditions established by law are met; once those conditions are met by a given state, a legal right to the grant (in the amount specified by the legal formula) is established, and OJJDP has no legal warrant to refuse to award it, or to award a lesser (or greater) amount.¹

States receiving formula grant funding from OJJDP are obligated to follow the requirements in the Act. Among other provisions, the Act includes four “core requirements,” referred to as such because the Formula Grant Program funding that states receive is reduced by 20% for each of these requirements with which OJJDP determines the state to be non-compliant. These core requirements are deinstitutionalization of status offenders (DSO) (42 U.S.C. 5633(a)(11)), separation (42 U.S.C. 5633(a)(12)), jail removal (42 U.S.C. 5633(a)(13)), and disproportionate minority contact (DMC) (42 U.S.C. 5633(a)(22)).

The DSO requirement provides that status offenders and non-offenders who are aliens or are alleged to be dependent, neglected, or abused, shall not be placed in secure detention or confinement. Status offenses are offenses that would not be a crime if committed by an adult, e.g., truancy, running away from home, and violating curfew.

The separation requirement of the JJDP Act provides that juveniles shall not be detained or confined such that they have sight or sound contact with adult inmates.

The jail removal requirement of the JJDP Act provides that (with limited exceptions) states may not detain or confine juveniles in adult jails or lockups.

¹ See, e.g., *City of Los Angeles v. Coleman*, 397 F. Supp. 547 (D.D.C. 1975).

Finally, the DMC requirement provides that states must work to address, with the goal of reducing, the disproportionate number of juveniles within the juvenile justice system who are members of minority groups.

The process used for establishing the compliance determination measure for the DSO requirement under the current regulation was to collect data regarding the number of instances of non-compliance with the DSO requirement for eight states in 1979 (two from each of the four Census Bureau regions), and data regarding the number of instances of non-compliance with the jail removal requirement for twelve states in 1986 (three from each of the four Census Bureau regions). The states selected were those with the lowest rates of non-compliance per 100,000 juvenile population that also had been identified as having an adequate system of monitoring for compliance. A detailed description of the process for developing the standard measures of compliance with the DSO requirement was published on January 9, 1981 (46 FR 2566), and the process for developing the standard measures for compliance with the jail removal requirement was published on November 2, 1988 (53 FR 44370).

Although compliance determinations for the DSO, separation, and jail removal requirements are based on specific numerical standards, this has not been the case for the DMC requirement. The JJDP Act provides that states must “address” disproportionate minority contact, but does not provide specific guidance as to how states’ compliance with the DMC requirement should be determined, other than to prohibit the use of numerical standards or quotas. In April 2013, the OJJDP Administrator determined that OJJDP’s method for determining states’ compliance with DMC warranted revisions to

ensure that compliance determinations were based on a standard that was more consistent and objective. This proposed rule, along with the new DMC assessment tool, will result in more consistent and objective DMC compliance determinations.

OJP's current Formula Grant Program regulation was published on May 31, 1995, and amended on December 31, 1996. In 2002, the JJDPA was reauthorized. This proposed rule, when finalized, will supersede the regulation published in December 1996, reflecting the statutory changes enacted in the 2002 reauthorization to bring the regulation in line with the JJDPA. The proposed rule also reflects OJP policy changes, as outlined in section IV of this preamble.

OJP invites and welcomes comments from states and territories, organizations, and individuals involved in youth development, juvenile justice, and delinquency prevention, as well as any other members of the interested public, on any aspects of this proposed rulemaking. All comments will be considered prior to publication of a final rule.

IV. Discussion of Changes Proposed in This Rulemaking

Proposed new standards for compliance with the DSO, separation, and jail removal requirements

OJP proposes a significant change to the standards for determining compliance with the DSO, separation, and jail removal requirements. The standards for the DSO and separation requirements were established in 1981, and the jail removal compliance standard was established in 1988. These standards are discussed in more detail below. In general, these standards provide that, depending upon a state's rate of non-compliance with the DSO, separation, or jail removal requirements, the state may still be determined

to be in compliance if it demonstrates that it meets specific criteria, such as having recently enacted state laws that can reasonably be expected to prevent future instances of non-compliance and an acceptable plan to prevent future instances of non-compliance. These standards can be found in the current regulation at section 31.303(f)(6)(i) and 46 FR 2566 (January 9, 1981) (DSO), 31.303(f)(6)(ii) (separation), and 31.303(f)(6)(iii) and 46 FR 44370 (November 2, 1988) (jail removal).

The principle of the *de minimis* standard, whereby something less than 100% compliance with statutory provisions is deemed sufficient, has long been accepted and applied in the context of interpreting federal statutes. *Washington Red Raspberry Comm'n v. United States*, 859 F. 2d 898, 902 (Fed. Cir. 1988). (“The *de minimis* concept is well-established in federal law. Federal courts and administrative agencies repeatedly have applied the *de minimis* principle in interpreting statutes, even when Congress failed explicitly to provide for the rule.”)

The proposed new standards would create numerical thresholds above which states are out of compliance, thereby allowing for more consistent, objective determinations of states’ compliance with the DSO, separation, and jail removal requirements.

OJP is proposing new terminology that would refer to a “substantial compliance” test for measurement of compliance with these standards. Such a test would continue to encourage the elimination of all instances of non-compliance but allow for a statistically inconsequential number of violations for the DSO and jail removal requirements without loss of Title II Part B funding to states. The new standard for compliance with the

separation requirement would require that states have zero instances of non-compliance. OJP recognizes and commends the significant progress states have made in reducing instances of non-compliance with the DSO, separation, and jail removal requirements since the standards for compliance were developed. For example, when comparing self-reported baseline data for these three standards compiled in the 1990s to data submitted covering calendar year 2013, the number of status offenders placed in secure correctional or secure detention facilities constituting instances of non-compliance with the DSO requirement has decreased by 99.9 percent, from 171,076 to 1,960; the number of juveniles detained or confined in institutions in which they have contact with adult inmates has decreased 99.9 percent, from 81,810 to 59; and the number of juveniles detained or confined in adult jails or lockups constituting instances of non-compliance has decreased 99.8 percent from 154,618 to 2,765. As a reflection of the continued progress over the past years made by states in improving compliance, the acceptable level of deviation allowable to remain in substantial compliance needs to be adjusted to reflect the new compliance reality.

Accordingly, in order to ensure that the core requirements continue to protect the safety and well-being of juveniles and are reflective of states' significant progress since the enactment of the JJDP, OJP is proposing to update the statistical measures of compliance with the DSO, separation, and jail removal requirements. The new compliance standard for the jail removal requirement would follow the same methodology originally used to develop the standard for compliance with that requirement. To align with the jail removal compliance determination standard, OJP is

proposing to follow a similar methodological process to establish compliance determination standards for the separation and DSO core requirements. As with jail removal, OJP will use data from three states from each of the four Census Bureau regions. The states selected will be those with the lowest non-compliance rates per 100,000 juvenile population, and which have also been determined to have an adequate compliance monitoring system.

Although the methodology originally used to establish the compliance standards for DSO in 1979 involved using data from two states in each of the four Census Bureau Regions, OJJDP is proposing to align with the methodology that was used to establish the jail removal compliance standards in 1986, and which is also being used to establish the separation compliance standard, which uses data from three states in each of the Census Bureau regions.

Following this methodology, and based on the compliance data from calendar year 2013, OJJDP is proposing that the substantial compliance rate for DSO be at or below 0.24. Using the lowest rates for three states in each of the Census Bureau regions would produce the following rates of compliance: Region I - Maine (0), New York (0), Pennsylvania (0.39); Region 2 - Nebraska (0), Michigan (0.12), Iowa (0.69); Region 3 - Delaware (0), Florida (0.51), Louisiana (0.59); and, Region 4 - Alaska (0), Nevada (0.30), and Hawaii (0.33). The average rate for these twelve states would be 0.24 per 100,000 juvenile population.

Following the same process, using three states from each Census Bureau region for the jail removal requirement, the results would be as follows: Region 1 - Maine (0),

New York (0), Massachusetts (0.54); Region 2 - North Dakota (0), South Dakota (0), Nebraska (0); Region 3 - District of Columbia (0), Texas (0.07), Georgia (0.19); and, Region 4 - Utah (0.23), Nevada (0.30) and Hawaii (0.33). The average rate for these twelve states would be 0.12 per 100,000 juvenile population.

Applying the same methodology used for the DSO and jail removal requirements to the separation requirement (something not done previously), the result would be as follows: Region 1 - Connecticut (0), Maine (0), New Hampshire (0); Region 2 - Illinois (0), Indiana (0), Iowa (0); Region 3 - Alabama (0), Kentucky (0), Louisiana (0); and, Region 4 - Arizona (0), California (0) and Colorado (0). Using this methodology, to be in compliance with the separation requirement, states would be required to report zero instances of non-compliance.

Unlike the current *de minimis* standards, these new standards for the DSO and jail removal requirements would establish a numerical threshold at or below which states will be in compliance and above which states will be out of compliance. Under the current *de minimis* standard, states have been allowed to demonstrate compliance by meeting certain criteria depending upon their rate of non-compliance. With the new standard, states will automatically be in or out of compliance depending on their rate, without regard to such factors as whether the state has recently enacted laws designed to eliminate the instances of compliance, whether the instances constituted a pattern or practice, or any other factors. OJP will review these compliance determination standards at least every five years for possible revision.

OJP welcomes comments on the methodology for setting the proposed standards for determining states' compliance with these three core requirements, which reflect one possible approach for determining compliance. OJP encourages suggestions for other possible methods for determining compliance with the core requirements.

Proposed requirement that states annually report compliance data for 100% of facilities

Section 31.7(4)(i) of the proposed rule would require that states provide compliance monitoring data for each federal fiscal year reporting period, for 100% of the facilities within the state that are required to report on compliance with the DSO, separation, and jail removal requirements. This would revise the standard under the current regulation that provides that states can submit a minimum of six months of data, and allows states to project, or annualize, that data to cover a twelve-month period. The new reporting requirement that states provide for 100% of facilities that are required to report will ensure that OJJDP can make a more accurate determination of whether each state has achieved compliance with these three core requirements. States' 2013 Compliance Monitoring Reports include the percentage of facilities reporting data from the following five categories: juvenile detention facilities, juvenile correctional facilities, adult jails, adult lockups, and collocated facilities. Thirty-three states and territories report data from 100% of all five categories of facilities; eleven states report data from at least 95% of each of the five categories of facilities; and eleven states and territories report data from less than 95% in at least one of the five categories of facilities. States may request that the Administrator grant a waiver, for good cause, of the provision that 100% of facilities must report.

Proposed changes to the DMC requirement

In 1988, the Act was amended to require that all states participating in the Formula Grant Program address disproportionate minority confinement in their state plans. Specifically, the amendment required that if the proportion of a given group of minority youth detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups exceeded the proportion that group represented in the general population, the state was required to develop and implement plans to reduce the disproportionate representation.

The 1992 amendments to the JJDPa elevated disproportionate minority confinement to a core requirement, tying 25 percent of each state's Formula Grant allocation for that year to compliance with that requirement. The 2002 reauthorization of the JJDPa modified the DMC requirement to require all states that participate in the Formula Grant Program address "juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system." This change broadened the requirement from disproportionate minority "confinement" to disproportionate minority "contact" (DMC), to address the overrepresentation of minority youth at all stages of the juvenile justice system, not merely when such youth are subject to confinement. (In addition, in the 2002 reauthorization, the reduction in funding for non-compliance with each of the core requirements was reduced from 25% to 20%.)

The proposed rule reflects the change from “disproportionate minority confinement” to “disproportionate minority contact” in the JJDP A’s 2002 reauthorization. In addition, the most significant change to DMC compliance in the proposed rule is the codification of the 5-phase reduction model that OJJDP previously implemented and that states have already been using.

Under proposed section 31.9(d), a state would be in compliance with DMC when it includes a DMC report within its state plan that contains a detailed description of adequate progress in implementing the 5-phase reduction model, which includes: (1) *Identification* of the extent to which DMC exists; (2) *Assessment and comprehensive analysis* to determine the significant factors contributing to DMC at each contact point; (3) *Intervention* strategies to reduce DMC; (4) *Evaluation* of the effectiveness of the delinquency prevention and system-improvement strategies; and (5) *Monitoring* to track changes in DMC statewide and in the local jurisdictions to determine whether there has been progress towards DMC reduction.

This 5-phase reduction model which, as noted previously, states have already been using, would replace the provision in the current regulation, under which compliance with DMC is achieved when a state meets the following three requirements in its state plan: (1) *Identification* of whether DMC exists; (2) *Assessment* of DMC – including identification and explanation of differences in arrest, diversion, and adjudication rates; and (3) *Intervention* through a time-limited plan of action for reducing DMC, which must address diversion, prevention, reintegration, policies and procedures, and staffing and training. 28 CFR 31.303 (j).

Proposed section 31.9(d)(1)(i) would codify the requirement implemented through OJJDP policy in 2003 that states use the Relative Rate Index to describe the extent to which minority youth are overrepresented in a state's juvenile justice system. The Relative Rate Index (RRI) is a method that involves comparing the relative volume (rate) of activity at each major stage of the juvenile justice system for minority youth with the volume of that activity for white (majority) youth. The RRI provides a single index number that indicates the extent to which the volume of that form of contact or activity differs for minority youth and white youth. In its simplest form, the RRI is the rate of activity involving minority youth divided by the rate of activity involving majority youth. (For additional and more detailed information regarding the use of the RRI, please refer to Chapter 1 of the DMC Technical Assistance Manual, 4th Edition, located on OJJDP's website at http://www.ojjdp.gov/compliance/dmc_ta_manual.pdf).

Prior to 2013, OJJDP relied on the expertise of individual staff to identify the strengths and weaknesses of a state's plan and determine whether a state was in compliance with the DMC requirement. In 2013, OJJDP determined that the process it was using to determine DMC compliance was not sufficiently objective to ensure consistent determinations. Thus, beginning in September 2013, states received compliance determination letters indicating that they were not out of compliance with the DMC requirement. States have been strongly encouraged to prioritize and increase their efforts to eliminate systemic racial and ethnic disparities and to seek training and technical assistance from OJJDP to assist them with fully implementing the OJJDP DMC

Reduction Model. OJJDP staff has continued to review states' DMC compliance plans with the goal of providing technical assistance to the states.

In order to more effectively and objectively assess the extent to which states are in compliance with the DMC requirement, OJJDP is implementing internal standards to determine if states are adequately addressing DMC. To this end, OJJDP is developing a statistical tool – in consultation with three technical assistance grantees who are leading experts in the field of racial and ethnic disparities – that will assess states' progress in addressing DMC. States' responses to a set of objective questions addressing each of the phases in the 5-phase reduction model will result in a score that will inform OJJDP in determining states' compliance with the DMC requirement. The more objective tool will allow OJJDP to better assess states' efforts in addressing DMC, which will facilitate the provision of more effective technical assistance to states to assist them in reducing DMC. OJJDP will provide more information prior to implementation of the tool, which will be finalized by September 30, 2016.

Through states' adherence to the 5-phase reduction model, and OJJDP's implementation of the objective assessment tool, the states and OJJDP will be in a better position to effectively address and reduce DMC where it exists.

Proposed section 31.9(d)(1)(i) would also require that states obtain the Administrator's approval for the selection of the three local jurisdictions with the highest minority concentration or with focused DMC-reduction efforts, for which states must use the Relative Rate Index to determine whether – and the extent to which – DMC exists at the following contact points within the juvenile justice system: arrest, diversion, referral

to juvenile court, charges filed, placement in secure correctional facilities, placement in secure detention facilities, adjudication as delinquent, community supervision, and transfer to adult court.

The proposed rule includes the following additional proposed changes to the DMC requirement: (1) eliminating references to the “Phase I Matrix” and to the “Phase II Matrix”, which have been replaced with the 5-phase reduction model; (2) requiring that an assessment and comprehensive analysis to determine the significant factors contributing to DMC at each contact point must be completed within twelve months of the identification of the existence of DMC (providing that the Administrator may grant an extension) (section 31.9(d)(1)(ii)); (3) prescribing when an assessment and analysis of DMC must be conducted (section 31.9(d)(ii)); (4) adding a requirement that states conduct an evaluation within three to five years of the intervention required under section 31.9(d)(iii), of the effectiveness of the intervention (section 31.9(d)(1)(iv)); (5) adding a requirement that states monitor to track changes in DMC to identify emerging issues affecting DMC and to determine whether progress towards DMC reduction has been made (section 31.9(d)(1)(v)); (6) requiring states to provide a timetable for implementing a data collection system to track progress towards reduction of DMC, including, where DMC has been found to exist, a description of the prior-year’s progress toward reducing DMC and an adequate DMC-reduction implementation plan (section 31.9(d)(1)(v)); (7) deleting the requirement that the intervention plan address diversion, prevention, reintegration, policies and procedures, and staffing and training; (8) changing the term “minority populations” to “minority groups,” to reflect the U.S. Census Bureau race and

ethnicity categories, and including it in the definition section in section 31.2 of the proposed rule; and (9) requiring that states report DMC data on the same federal fiscal year schedule on which they report compliance data for the DSO, separation, and jail removal requirements.

Compliance reporting period changed to federal fiscal year

Proposed section 31.8 would change the reporting period for compliance monitoring data to the federal fiscal year, consistent with the JJDPA. Under 42 U.S.C. 5633(c), “if a State fails to comply with [the core requirements] in any *fiscal year* ... the amount allocated to such State ... for the subsequent fiscal year beginning after September 30, 2001 ... shall be reduced.” (Emphasis added.) By its terms, this provision contemplates that the relevant period for determining compliance is the federal *fiscal* year. The fact that the statute specifically references the “fiscal year beginning after September 30, 2001...” indicates that states were required to be in compliance for the federal fiscal year beginning on October 1, 2001, and that annually thereafter states’ compliance would be evaluated based on data reported for each federal fiscal year.

Proposed definitions

Proposed section 31.2 would provide definitions for some terms that are used but not defined in the JJDPA, and for some terms that are used in the regulation itself. Notably, this proposed rule would add a definition of the term “detain or confine” that clarifies that the term includes non-secure detention – that is, a juvenile is detained when he is not free to leave, even though he is not securely detained within a locked room or cell, or by being handcuffed to a cuffing rail or bench. Under the current regulation,

OJJDP has equated “being ‘detained’ or ‘confined’” with “being in ‘secure custody’”; *i.e.*, that “detention” (or “confinement”) occurs *whenever* a juvenile is in “secure custody,” as that term is discussed in the current regulation at 28 CFR 31.303(d)(1)(i) — and *only* when in such “secure custody.” Under that guidance, a juvenile who merely entered a building with a secure perimeter pursuant to public authority would be, thereby, in “secure custody” and therefore “detained or confined,” regardless of whether he was free to leave (and even if he *knew* he was free to leave); conversely, however, a juvenile whose hands were handcuffed behind his back by the police, who was told by police officers that he was not free to leave their presence, and who was physically prevented from leaving their presence by armed guards would be, according to OJJDP guidance, not “detained or confined” because he is not in what OJJDP has defined as “secure custody.”

Within the contemplation of the law, however, in the ordinary course, the plain meaning of “detain” requires, at a minimum, that the person allegedly detained not be free to leave. Fourth Amendment jurisprudence, which equates detention with the “seizure” of a person by a government or its agents, supports this understanding of the term. Generally speaking, a person is detained, or “seized” within the meaning of the Fourth Amendment, if, by means of physical force or show of authority, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave; conversely, if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he *is* free to leave, he is not being detained. *U.S. v. Mendenhall*, 446 U.S. 544, 554-555 (1980). For this reason, the proposed rule would

clarify that a juvenile is detained or confined when he is not free to leave, regardless of whether he is held securely or non-securely.

The proposed definition of “detain or confine” includes a rebuttable presumption that a juvenile is not detained or confined when his parent or legal guardian acknowledges in writing that he is free to leave. This does not create a requirement that such acknowledgment be in writing, but rather creates a presumption that the juvenile knew that he was free to leave, which may also be demonstrated in other ways, such as through a video recording of the juvenile’s acknowledgment that he knows that he is free to leave.

The proposed rule also would add a definition of “placed or placement” such that that occurs only when a status offender or a non-offender who is an alien or is alleged to be dependent, neglected, or abused, is detained or confined for a period of 24 hours or longer in a secure juvenile detention or correctional facility or for any length of time in a secure adult detention or correctional facility, as outlined in the proposed definition in section 31.2 of the proposed rule.

Proposed deletion of text repetitive of statutory provisions

OJP notes that the proposed rule is drafted to be read *in conjunction* with the rules and definitions in the applicable sections of the JJDPa (42 U.S.C. 5601, *et seq.*). Thus, where the existing regulation contains extended repetition of JJDPa statutory language, the proposed rule would omit that statutory language, except where needed for context and ease of use. For example, the proposed rule would delete the following sections of the current regulation: section 31.100 (Eligibility) (repetitive of text found at 42 U.S.C.

5603(7)); section 31.101 (Designation of State agency) (describes requirements at 42 U.S.C. 5633(a)(1) and (2)); section 31.301 (Funding) (describes the funding allocation at 42 U.S.C. 5632(a)); section 31.302 (Applicant state agency) (describes requirements at 42 U.S.C. 5633(a)(1) and (2)); section 31.303(a) (Assurances) (see 42 U.S.C. 5633, generally); section 31.303(c)(1) (describes DSO requirements found at 42 U.S.C. 5633(a)(11)); section 31.303(c)(5) (describes a requirement of the state plan found at 42 U.S.C. 5633(a)(12)); section 31.303(e)(1) (describes a requirement of the state plan required under the jail removal requirement at 42 U.S.C. 5633(a)(13)); section 31.303(e)(3) (provides a definition for the term “collocated facilities” which is defined in the Act at 42 U.S.C. 5603(28); section 31.303(f)(iii)(3) (Valid court order) (provides a definition for the term “valid court order” (VCO) which is defined in the Act at 42 U.S.C. 5603(16)); section 31.303(g) (Juvenile crime analysis) (repeats a requirement found at 42 U.S.C. 5633(a)(7)); section 31.404 (Participation by faith-based organizations) (states a requirement described in 28 CFR part 38); and section 31.102 (State agency structure) (addresses a provision regarding the state agency that is addressed in the Act at 42 U.S.C. 5633(a)(1) and (2) and 42 U.S.C. 5633(b)).

Section 31.303(f)(5) (Reporting requirement) would also be removed, as it restates the requirement found at 42 U.S.C. 5633(a)(14) that states report annually on the status of their compliance with the core requirements. The language in section 31.303(f)(5) of the current regulation that specifies the reporting period would now be included in section 31.8 of the proposed rule. The remaining text, detailing the specific data that must be included in the report, is proposed to be deleted as it is included in

OJP's data collection tool that states have already been using. The tool will be submitted to OMB for review and approval and will be published for notice and comment in the Federal Register.

OJP solicits public comment on whether the regulatory provisions of part 31 will be sufficiently clear to readers as proposed, or whether it may be helpful to assist readers by inserting some additional cross-references that cite to (but do not duplicate) the relevant statutory provisions.

Proposed deletion of federal wards provision

OJJDP published a notice in the *Federal Register* on January 9, 1981,² explaining that if a state's DSO rate was above 29.4 per 100,000 juveniles in the state's population, OJJDP would consider a request from the state that "exceptional circumstances" existed that would justify the state being allowed to deduct any violations that resulted from the detention of federal wards. According to the *Federal Register* notice –

The following will be recognized for consideration as exceptional circumstances: ...Federal wards held under Federal statutory authority in a secure State or local detention facility [1] for the sole purpose of affecting a jurisdictional transfer, [2] appearance as a material witness, or [3] for return to their lawful residence or country of citizenship...

OJJDP has understood the first category (juveniles detained for the sole purpose of affecting a jurisdictional transfer) to include juveniles who may be status offenders or non-offenders who are alleged to be dependent, neglected, or abused, and thus would be

² See *Policy and Criteria for de Minimis Exceptions to Full Compliance With Deinstitutionalization Requirement of Juvenile Justice and Delinquency Prevention Act*, 46 FR 2566.

covered by the DSO requirement. OJJDP has understood the second category (juveniles detained pending an appearance as a material witness) to include juveniles who are neither status offenders nor non-offenders who are alleged to be dependent, neglected, or abused. As such, none of the juveniles in this second category would, in fact, be covered by the DSO requirement.

Finally, the third category (juveniles detained pending return to their lawful residence or country of citizenship, i.e., aliens) includes juveniles *explicitly* covered by the DSO requirement, which prohibits placement in secure correctional facilities or secure detention facilities of aliens who are non-offenders.

With respect to immigration detainees in DHS custody, as noted above, the DSO requirement provides that *status offenders* and *non-offenders who are aliens* shall not be “placed” in secure correctional or secure detention facilities. To the extent that juvenile immigrant detainees are status offenders or non-offenders, the DSO requirement expressly applies to them, and the placement of those juveniles in a state’s secure correctional or secure detention facilities would constitute violations of the DSO requirement.

With the elimination of the federal ward provision, states would be required to report the secure placement of undocumented juvenile immigrants who are status offenders or non-offenders in state or local facilities pursuant to federal authority. The elimination of the policy on federal wards may affect a very small number of states that have a DSO rate above 29.4 that, because they could no longer deduct the “federal wards” from their DSO rate, would be found out of compliance. Based on states’ 2013

data, no state had a DSO rate above 29.4 such that it was able to make use of the federal ward provision.

For all of the above reasons, OJP is proposing to delete the provision regarding federal wards in the proposed rule.

Proposed deletion of provisions rendered obsolete by the 2002 JJDP A reauthorization

The proposed rule would delete provisions of the current regulation that are rendered obsolete following the 2002 reauthorization of the JJDP A. These include sections 31.303(f)(6)(C) and (D), which, under the JJDP A of 1974, addressed waivers related to states' funding for FY 1993 and prior years, and which are no longer applicable.

Proposed deletion of requirements not specific to the Formula Grant Program

The proposed rule would delete sections of the current regulation that contain requirements applicable to all OJP grantees, including section 31.201 (Audit), which repeats requirements found in the OJP Financial Guide; section 31.202 (Civil Rights), which repeats requirements found in 28 CFR 42.201, and 42.301, et seq.; and section 31.401 (Compliance with other Federal laws, orders, circulars) which references, generally, "other applicable Federal laws, orders and OMB circulars" (e.g. the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, found at 2 CFR part 200). These sections are unnecessary because in accepting a Formula Grant Program award, states explicitly agree to comply with "all applicable Federal statutes, regulations, policies, guidelines, and requirements." In addition, special conditions included on all Formula Grant Program awards specifically require that states

agree to comply with 2 CFR part 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; the Equal Employment Opportunity Plan required under 28 CFR 42.302; as well as OJP's Financial Guide.

Proposed deletion of provisions that describe recommendations rather than requirements

The proposed rule would delete sections of the current regulation that do not contain requirements that states must meet in order to be in compliance with the Formula Grant Program requirements and that provide information that would be more appropriate for inclusion in policy guidance provided to states. These include section 31.303(b) of the current regulation, "Serious juvenile offender emphasis," which encourages, but does not require, states to allocate funds a certain way; and section 31.303(d)(1)(v), which provides examples of what's allowed and not allowed under the separation requirement. OJP policy documents will include recommendations, discussions of best practices, and illustrative examples of what scenarios might or might not constitute compliance with Formula Grant Program requirements.

Proposed deletion of provisions that are unnecessary or duplicative of the Formula Grant Program solicitation

The proposed rule would delete as unnecessary the text in section 31.2 of the current regulation acknowledging the establishment of the Office of Juvenile Justice and Delinquency Prevention; and section 31.203, which requires states to follow their own open meeting and public access laws and regulations.

The proposed rule would delete section 31.3 of the current regulation ("Formula grant plan and applications"), which requires that Formula Grant Program applications be submitted by August 1st or within 60 days after states are notified of their formula grant

allocations. The unpredictable timing of OJP's appropriations requires that OJP have flexibility in setting the deadline for Formula Grant Program applications.

Finally, section 31.303(i) of the current regulation ("Technical assistance"), references a requirement stated in the Formula Grant Program solicitation, and that need not be repeated in the regulation, that states describe in their state plan their technical assistance needs.

V. Regulatory Certifications

Regulatory Flexibility Act

In accordance with the principles of the Regulatory Flexibility Act (5 U.S.C. 605(b)), the Office of Justice Programs has reviewed this regulation and, by approving it, certifies that it will not have a significant economic impact on a substantial number of small entities, as the rule regulates only states and territories, which are the recipients of funding under the Formula Grant Program authorized at 42 U.S.C.

5631. This proposed rule updates the implementing regulation for the Formula Grant Program, including the requirements that states and territories must meet in order to receive funding, and among other things, provides a clearer basis for determining state and territory compliance with the applicable statutory standards. Although states are required to subaward 66 2/3 percent of their formula grant funds to local governments and local private agencies, whether a particular local entity receives a subaward is solely within the discretion of the state and is unaffected by this proposed rule. As noted above, this rule does not regulate small entities and does nothing to create or increase the financial burden on small entities.

This regulation, therefore, will not have a significant economic impact on a substantial number of small entities.

Executive Orders 12866 and 13563 - Regulatory Review

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review" section 1(b), Principles of Regulation, and in accordance with Executive Order 13563 "Improving Regulation and Regulatory Review" section 1(b), General Principles of Regulation. The proposed rule is necessary for the implementation of the Formula Grant Program, as required in the Act at 42 U.S.C. 5632(1); 42 U.S.C. 5632(d); and 42 U.S.C. 5633(a).

The Office of Justice Programs has determined that this rule is a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review, and accordingly this rule has been reviewed by the Office of Management and Budget. For a discussion of the impact of the proposed rule on states and other entities, including the costs and benefits, and the number of states that might be out of compliance (and the corresponding dollar amounts affected) under the proposed rule, please see further discussion below in this section of the preamble.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits.

This proposed rule is necessary to update the implementing regulation for the Formula Grant Program authorized under Title II, Part B, of the JJDPA, to conform with the amendments to the Act following the 2002 reauthorization, and thus there are no alternatives to this direct regulation. OJP considered other approaches to the specific requirements included in this proposed regulation and determined that the proposed requirements most effectively implement the provisions of the JJDPA. OJP welcomes comments from the public on any provisions of the proposed rule, as well as suggestions for alternative approaches to those provisions.

Deleting provisions of the current regulation that are recommended practices, rather than Formula Grant Program requirements that states must meet, would streamline and simplify the rule, making the requirements more easily accessible. OJJDP's recommended practices for states regarding treatment of juveniles in the juvenile justice system can be found in policy documents on OJJDP's website at <http://www.ojjdp.gov/compliance/index.html>.

As noted above, it is difficult to quantify the financial cost that states will incur should the proposed regulation be promulgated as drafted. Some of the proposed provisions would require states to dedicate additional time and resources to collecting, verifying, and reporting additional compliance monitoring data. In addition, the proposed new compliance standards may result in more states being found out of compliance than would be out of compliance under the current standards. OJP discusses below some of the estimated costs to states of the proposed rule.

For example, the proposed requirement that states must report compliance monitoring data from 100% of facilities that are required to report would require that state staff spend more time collecting information from those facilities not immediately responsive to data requests. In addition, the proposed definition of “detain or confine” in section 31.2 would require that states report data for any juveniles held such that they were not free to leave, whether securely or non-securely, in adult jails or lockups and in any institutions in which the juveniles have contact with adult inmates. This data set would include some holds that were not reportable under the current regulation and, as a result, may necessitate a reassessment and modification of state monitoring practices.

Under the proposed new standards for determining compliance in section 31.9, more states would likely be found out of compliance with one or more of the core requirements than would be found out of compliance under the current *de minimis* standards. Because states’ formula grant funding is reduced by 20% for each of the core requirements with which a state is determined to be out of compliance, pursuant to 42 U.S.C. 5633(c), the new compliance standards would likely result in more states receiving reduced formula grant awards than would under the current compliance standards.

Under the current regulation, using states’ calendar year (CY) 2013 data, OJJDP determined two states to be out of compliance with the DSO requirement. Using that same CY 2013 data, under the proposed new DSO compliance standard, a total of forty-three states would be determined to be out of compliance, resulting in a collective reduction in funding in the amount of \$6,826,126. Under the current compliance

standard for the separation requirement, based on CY 2013 data, OJJDP found three states out of compliance. Using that same data, eight states would be determined to be out of compliance under the proposed standard, resulting in a collective reduction in funding in the amount of \$1,292,217. Finally, based on states' CY 2013 data, OJJDP determined four states to be out of compliance with the jail removal requirement. Using that same data, a total of forty-one states would be determined to be out of compliance under the proposed compliance standard for the jail removal requirement, resulting in a collective reduction in the amount of \$6,574,336. Thus, based on compliance figures for CY 2013, the total amount of funds by which non-compliant states' formula grant funding would have been reduced is \$14,692,679 if the new standards had been in effect. Of course, because the proposed new standards would be in effect only in future years, the actual effect of the new standards is dependent on the states' future levels of compliance.

When states' formula grant funding is reduced for non-compliance with any of the core requirements, those funds are made available to states that have achieved full compliance with the core requirements. This potential additional funding provides an incentive for compliant states to remain in compliance.

The proposed rule would not make substantive changes to how states address DMC, as they would continue to follow the 5-phase reduction model.

Any burden on the states created by the revised standards for determining compliance is outweighed by the considerable benefit provided to juveniles by greater adherence to the statutory provisions of the Formula Grant Program to ensure that

juveniles are afforded the protections provided by the core requirements. Through the implementation of this proposed rule, OJJDP will ensure closer adherence to the requirements of the Formula Grant Program, particularly with respect to the application of the four core requirements (DSO, separation, jail removal, and DMC), compliance with which determines whether states receive their full formula grant allocation. By establishing numerical standards for determining compliance with the DSO, separation, and jail removal requirements, and with the utilization of a new DMC assessment tool, OJJDP's process for determining compliance with each of the four core requirements will be more transparent and objective.

This proposed rule will ensure improved enforcement of the core requirements, which will benefit youth within the juvenile justice system by ensuring that: (1) status offenders are not placed in secure detention or secure correctional facilities; (2) juveniles are not detained such that they have sight or sound contact with adult inmates; (3) juveniles are not detained in jails and lockups for adults; and (4) states are appropriately addressing the problem of disproportionate minority contact, where it exists.

The enhanced enforcement of the core requirements will result in a reduced risk of youth becoming further involved in the juvenile justice system, and of their subsequent involvement in the criminal justice system.

Executive Order 13132 - Federalism

This proposed rule will not have a substantial direct effect on the relationship between the national government and the states, on distribution of power and responsibilities among the various levels of government or on states' policymaking

discretion. This proposed rule updates the implementing regulation for the Formula Grant Program, including the requirements that states and territories must meet in order to receive funding, and among other things, provides a clearer basis for determining state and territory compliance with the applicable statutory standards. States that participate in the Formula Grant Program do so voluntarily, and as a condition of receiving formula grant funding agree to comply with the relevant statutory requirements. The rule, itself, does not create any obligation on the part of states. Therefore, in accordance with Executive Order No. 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Executive Order 12988 - Civil Justice Reform

This rule meets the applicable standards set forth in §§ 3(a) & (b)(2) of Executive Order No. 12988. Pursuant to § 3(b)(1)(I) of the Executive Order, nothing in this or any previous rule (or in any administrative policy, directive, ruling, notice, guideline, guidance, or writing) directly relating to the Formula Grant Program is intended to create any legal or procedural rights enforceable against the United States, except as the same may be contained within subpart B of part 94 of title 28 of the Code of Federal Regulations.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by state, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. The Formula Grant Program provides funds to states to assist them in planning, establishing, operating, coordinating,

and evaluating projects directly or through grants and contracts with public and private agencies for the development of more effective education, training, research, prevention, diversion, treatment, and rehabilitation programs in the area of juvenile delinquency and programs to improve the juvenile justice system. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by the Small Business Regulatory Enforcement Fairness Act of 1996, codified at 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction Act

This proposed rule includes requirements for the collection and reporting of additional compliance monitoring data beyond that required in the current regulation to fulfill the statutory requirement for states in 42 U.S.C. 5633(14). Accordingly, OJP is submitting its data collection of information for approval to OMB as required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, et seq.) and its implementing regulations at 5 CFR part 1320.

List of Subjects in 28 CFR Part 31

Administrative practice and procedure, juvenile delinquency prevention, juvenile justice, Formula Grant Program, Juvenile Justice and Delinquency Prevention Act (JJDP A).

Accordingly, for the reasons set forth in the preamble, part 31 of chapter I of Title 28 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for part 31, subpart A continues to read as follows:

Authority: 42 U.S.C. 5611(b); 42 U.S.C. 5631.

2. Subpart A is revised to read as follows:

Subpart A—Formula Grants

Contents

General Provisions

- 31.1 Scope of subpart.
- 31.2 Definitions.
- 31.3 Terms: construction, severability; effect.
- 31.4 Prohibited discrimination.
- 31.5 Formula allocation.
- 31.6 State plan requirements.
- 31.7 Core requirement monitoring.
- 31.8 Core requirement reporting.
- 31.9 Core requirement compliance determinations.

General Provisions

§ 31.1 Scope of subpart.

This subpart implements the Formula Grant Program authorized by Part B of Title II of the Juvenile Justice and Delinquency Prevention Act (the “Act”).

§ 31.2 Definitions.

The following definitions are applicable to this subpart A, in addition to the definitions and provisions set forth in the Act.

Administrator means the Administrator of the Office of Juvenile Justice and Delinquency Prevention.

Alien, as used in the Act, at 42 U.S.C. 5633(a)(11)(B)(ii)(I), has the meaning as defined at 8 U.S.C. 1101 which, at the time of promulgation of this subpart, means any person not a citizen or national of the United States.

Annual performance report means the report required to be submitted pursuant to the Act, at 42 U.S.C. 5633(a).

Assessment, as used in the Act, at 42 U.S.C. 5633(a)(23)(C)(i), means an evaluation by an authorized representative that includes—

(1) A description of a juvenile’s behavior as well as the circumstances under which the juvenile was brought before the court;

(2) Assessment of the appropriateness of available placement alternatives, including, without limitation, community-based placement options and secure confinement; and

(3) Elaboration of any factors not included in paragraph (1) or (2) of this definition that may bear significantly on a determination of where to place the juvenile.

Authorized representative, as used in the Act, at 42 U.S.C. 5633(a)(23), means a child welfare professional employed or retained by an appropriate state or local

public agency to make the assessment required under the Act, at 42 U.S.C. 5633(a)(23)(C)(i).

Compliance Monitoring Report means a report required under the Act, at 42 U.S.C. 5633(a)(14), that contains information necessary to determine compliance with the core requirements as one component of the annual performance report.

Construction fixtures, as used in the Act, at 42 U.S.C. 5603(12) and (13), means any fittings or appurtenances that are securely and permanently attached to a building.

Contact between juveniles and adult inmates means any physical contact, or any sustained sight or sound contact, between juvenile offenders in a secure custody status (on the one hand) and incarcerated adults (on the other), including inmate trustees. Sound contact means direct oral communication. Sight contact means clear visibility within close proximity. Sustained contact does not include contact that is brief and inadvertent.

Convicted means having been found guilty (or having pleaded guilty, no contest, or *nolo contendere*), and on that basis being or remaining detained or confined in a law enforcement facility.

Core requirements means the requirements specified in the Act, at 42 U.S.C. 5633(a)(11), (12), (13), and (22) (respectively, the deinstitutionalization of status offenders (DSO), separation, jail removal, and disproportionate minority contact (DMC) requirements), as defined in this section.

Designated state agency means the state agency responsible for the administration of the program regulated by this subpart.

Detain or confine means to hold, keep, or restrain a person such that a reasonable person would believe that he is not free to leave.

DMC Requirements means the requirements related to the disproportionate number of juvenile members of minority groups who come into contact with the juvenile justice system, as referred to in the Act, at 42 U.S.C. 5633(a)(22).

DSO Requirements means the requirements related to the deinstitutionalization of status offenders and others, as set forth in the Act, at 42 U.S.C. 5633(a)(11).

Extended juvenile court jurisdiction means the jurisdiction a juvenile court may have over an individual who has reached the age of full criminal responsibility under applicable state law but nonetheless remains in the physical custody of state juvenile detention, correctional, or other facilities, under such law.

Full due process rights guaranteed to a status offender by the Constitution of the United States, as used in the Act, at 42 U.S.C. 5603(16), means such rights, as specified pursuant to rulings of the U.S. Supreme Court.

Jail removal requirements means the requirements relating to detention or confinement of juveniles, as set forth in the Act, at 42 U.S.C. 5633(a)(13).

Juvenile means an individual who is subject to a state's ordinary juvenile court jurisdiction or remains under the state's extended juvenile court jurisdiction.

Juveniles alleged to be or found to be delinquent, as used in the Act, at 42 U.S.C. 5633(a)(12), means juveniles who have been charged with, or have been

adjudicated as delinquent for having committed, an offense other than a status offense.

Juveniles who are accused of nonstatus offenses, as used in the Act, at 42 U.S.C. 5633(a)(13), means juveniles who have been charged with an offense other than a status offense.

Minority groups means populations in the following categories, as defined (at the time of promulgation of this subpart) by the U.S. Census Bureau: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino, and Native Hawaiian or Other Pacific Islander.

Monitoring universe means all facilities within a state in which adult inmates are detained or confined, or in which juveniles might be detained or confined, including facilities owned or operated by public or private agencies.

Non-secure facility, as used in the Act, at 42 U.S.C. 5633(a)(14), means a facility that does not have construction fixtures or the capability to securely detain individuals; e.g., locked cells or rooms that may be locked from the outside such that a person may be securely confined therein, cuffing benches, rails, or bolts, or other construction fixtures which could be used to physically restrict the movement of individuals.

Placed or placement refers to what has occurred when a juvenile charged with a status offense, or a juvenile non-offender who is an alien or is dependent, neglected, or abused —

(1) Is detained or confined in a secure correctional facility for juveniles or a secure detention facility for juveniles—

(i) For 24 hours or more before an initial court appearance;

(ii) For 24 hours or more following an initial court appearance; or

(iii) For 24 hours or more for investigative purposes, or identification;

(2) Is detained or confined in a secure correctional facility for adults or a secure detention facility for adults; or

(3) With respect to any situations not described in paragraph (1) or (2) of this definition, is detained or confined pursuant to a formal custodial arrangement ordered by a court or other entity authorized by state law to make such an arrangement.

Public holidays means all official federal, state, or local holidays on which the courts in a jurisdiction are closed.

Residential, as used in the Act, at 42 U.S.C. 5603(12) and (13), means designed or used to detain or confine individuals overnight.

Responsible Agency Official, as used in—

(1) Section 18.5(a) of this title, means the Administrator; and

(2) Section 18.5(e) of this title, means the Assistant Attorney General, Office of Justice Programs, whose decision on appeal shall be the final agency decision referred to in 28 CFR 18.9.

Separation requirements means the requirements related to contact between juveniles and adult inmates, as set forth in the Act, at 42 U.S.C. 5633(a)(12).

Status offender means an individual who has been charged with or who has committed a status offense.

Status offense means an offense that would not be criminal if committed by an adult.

Twenty-four hours means a consecutive 24-hour period, exclusive of any hours on Saturdays, Sundays, public holidays, or days on which the courts in a jurisdiction otherwise are closed.

§ 31.3 Terms; construction, severability; effect.

(a) Terms. In determining the meaning of any provision of this subpart, unless the context should indicate otherwise, the first three provisions of 1 U.S.C. 1 (rules of construction) shall apply.

(b) Construction, severability. Any provision of this subpart held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to give it the maximum effect permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event such provision shall be deemed severable herefrom and shall not affect the remainder hereof or the application of such provision to other states not similarly situated or to other, dissimilar circumstances.

(c) The regulations in this subpart are applicable [DATE 60 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE FEDERAL REGISTER], except that the compliance standards set forth in § 31.9 will be applicable beginning in

the first compliance reporting period following the promulgation of this rule in final form.

§ 31.4 Prohibited discrimination.

(a) The non-discrimination provision specified at 42 U.S.C. 3789d(c), and incorporated into the Act at 42 U.S.C. 5672(b), shall be implemented in accordance with 28 CFR part 42.

(b) In complying with the non-discrimination provision at 42 U.S.C. 3789d(c), as implemented by 28 CFR part 42, the designated state agencies and sub-recipients shall comply with such guidance as may be issued from time to time by the Office for Civil Rights within the Office of Justice Programs.

§ 31.5 Formula allocation.

The relative population of individuals under age eighteen, as used to determine a state's annual allocation for grants administered under this subpart, pursuant to 42 U.S.C. 5632(a), shall be determined according to the most recent data available from the U.S. Census Bureau.

§ 31.6 State Plan requirements.

As part of what is required pursuant to the Act, at 42 U.S.C. 5633(a), and pursuant to this subpart, each state shall, in its State Plan—

- (1) Describe any barriers actually or potentially faced by the state in achieving compliance with each of the four core requirements.

(2) Describe policies and procedures in effect for receiving, investigating, and reporting complaints involving activity that would result in instances of non-compliance with any of the four core requirements.

§ 31.7 Core requirement monitoring.

No state shall be understood to have an adequate system of monitoring pursuant to the Act, at 42 U.S.C. 5633(a)(14), unless the following are included within its State Plan:

(a) Identification of each facility within the monitoring universe;

(b) Classification of each facility within the monitoring universe, including—

(1) By type of facility (e.g., juvenile detention or correctional facility, adult correctional institution, and jail or lockup for adults);

(2) By indication of whether the facility is public or private, and residential or nonresidential; and

(3) By indication of whether the facility's purpose is to detain or confine juveniles only, adults only, or both juveniles and adults;

(c) Indication that the state has conducted (and will continue to conduct) an on-site inspection of each facility within the monitoring universe at least once every 3 federal fiscal years—

(1) To ensure an accurate classification of each facility;

(2) To ensure accurate recordkeeping by each facility, including verification of self-reported data provided by a facility;

(3) To determine whether the data relating to each facility are valid and

maintained in a manner that allows a state to determine compliance with the DSO, jail removal, and separation requirements; and

(4) To determine (as applicable) whether adequate sight and sound separation between juveniles and adult inmates exists.

(d) With respect to facilities within the monitoring universe that have been classified such that they are required to report annual compliance data (e.g., juvenile detention or correctional facilities, adult correctional institutions, and jails or lockups for adults) —

(1) A report, covering the applicable full federal fiscal year, of the instances of non-compliance with the DSO, separation, and jail removal requirements within—

(A) 100% of such facilities; or (B) Not less than 90% of such facilities, coupled with the submission of data from the remaining non-reporting facilities, within 60 days of the original submission deadline, except that states may request that the Administrator grant a waiver, for good cause, of the provision that 100% of facilities report; and

(2) Where such data are self-reported by facility personnel or are collected and reported by an agency other than the designated state agency—

(i) A description of a statistically-valid procedure used to verify such data; and

(ii) An indication that the designated state agency verified such data through onsite review of each facility's admissions records and booking logs;

(e) Certification that the state has policies and procedures in place governing the implementation and maintenance of an adequate system of monitoring, and, where the state has different definitions for juvenile and criminal justice terms than those provided

in the Act and this subpart, a precise description of those differences and a certification that the definitions in the Act and this subpart have been used in the monitoring process and in the State Plan;

(f) Description of the authority or arrangement under which the designated state agency enters facilities to inspect and collect data from all facilities within the monitoring universe classified such that they are required to report annual compliance data.

(g) A timetable specifically detailing when and in which facilities compliance monitoring will occur;

(h) Description of procedures for receiving, investigating, and reporting complaints of instances of non-compliance with the DSO, jail removal, and separation requirements; and

(i) Description of any barriers faced in implementing and maintaining a system adequate to monitor the level of compliance with the DSO, jail removal, and separation requirements, including (as applicable) an indication of how it plans to overcome such barriers.

§ 31.8 Core requirement reporting.

(a) Time period covered. The compliance monitoring report shall contain data for one full federal fiscal year (i.e., October 1st through the following September 30th).

(b) Deadline for submitting compliance data. The compliance monitoring report shall be submitted no later than January 31st immediately following the fiscal year covered by the data contained in the report.

(c) Certification. The information contained in a state's compliance monitoring

report, shall be certified in writing by a designated state official authorized to make such certification, which certification shall specify that the information in the report is correct and complete to the best of the official's knowledge and that the official understands that a false or incomplete submission may be grounds for prosecution, including under 18 U.S.C. 1001 and 1621.

§ 31.9 Core requirement compliance determinations.

(a) *Compliance with the DSO requirement.* A state is in compliance with the DSO requirement for a federal fiscal year when it has a rate of compliance at or below 0.24 per 100,000 juvenile population in that year.

(b) *Compliance with the separation requirement.* A state is in compliance with the separation requirement for a federal fiscal year when it has zero instances of non-compliance in that year.

(c) *Compliance with the jail removal requirement.* A state is in compliance with the jail removal requirement for a federal fiscal year when it has a rate of compliance at or below 0.12 per 100,000 juvenile population in that year.

(d) *Compliance with the DMC requirement.* A state is in compliance with the DMC requirement when it includes a DMC report within its State Plan, which report contains the following:

(1) A detailed description of adequate progress in implementing the following 5-phase DMC reduction model:

(i) Identification of the extent to which DMC exists, via the Relative Rate Index (a measurement tool to describe the extent to which minority youth are overrepresented at

various stages of the juvenile justice system), which must be done both statewide and for at least three local jurisdictions (approved by the Administrator) with the highest minority concentration or with focused-DMC-reduction efforts, and at the following contact points in the juvenile justice system: arrest, diversion, referral to juvenile court, charges filed, placement in secure correctional facilities, placement in secure detention facilities, adjudication as delinquent, community supervision, and transfer to adult court;

(ii) Assessment and comprehensive analysis (which must be completed within 12 months of identification of the existence of DMC, or such longer period as may be approved by the Administrator) to determine the significant factors contributing to DMC identified pursuant to paragraph (d)(1)(i) of this section, at each contact point where it exists. Such assessment and comprehensive analysis shall be conducted—

(A) When DMC is found to exist within a jurisdiction at any of the contact points listed in paragraph (d)(1)(i) of this section, and not less than once in every five years thereafter;

(B) When significant changes in the Relative Rate Index are identified during the state's monitoring of DMC trends; or

(C) When significant changes in juvenile justice system laws, procedures, and policies result in statistically-significant increased rates of DMC;

(iii) Intervention, through delinquency prevention and systems-improvement strategies to reduce DMC that have been assessed under paragraph (d)(1)(ii), based on the results of the identification data and assessment findings, which strategies target communities where there is the greatest magnitude of DMC throughout the juvenile

justice system and include, at a minimum, specific goals, measurable objectives, and selected performance measures;

(iv) Evaluation (within three to five years of the DMC-related intervention under paragraph (d)(1)(iii)) of the effectiveness of the delinquency prevention and systems-improvement strategies, using appropriate formal, methodological evaluative instruments, including the appropriate Performance Measures for the Data Collection and Technical Assistance Tool (DCTAT), located on OJJDP's website, which will assist in gauging short and long-term progress toward reducing DMC; and

(v) Monitoring to track changes in DMC statewide and in the local jurisdictions under paragraph (d)(1)(i) of this section, in order to identify emerging issues affecting DMC and to determine whether there has been progress towards DMC reduction where it has been found to exist, to include the making of comparisons between current data and data obtained in earlier years and (when quantifiable data are unavailable to determine whether or to what extent the Relative Rate Index has changed) the provision of a timetable for implementing a data collection system to track progress towards reduction of such DMC; and

(2) Where DMC has been found to exist—

(i) A description of the prior-year's progress toward reducing DMC; and

(ii) An adequate DMC-reduction implementation plan (including a budget detailing financial and/or other resources dedicated to reducing DMC).

Dated: July 27, 2016.

Karol V. Mason,
Assistant Attorney General.

[FR Doc. 2016-18371 Filed: 8/5/2016 8:45 am; Publication Date: 8/8/2016]